IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 678 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHEMABHAI S PATEL

Versus

STATE OF GUJARAT

Appearance:

MR JOSHI FOR M/S THAKKAR ASSOCIATES for Appellant

MR HM PRACHHAK, APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 03/12/2003

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE J.R.VORA)

1. This Appeal is preferred by the appellant original accused No.1 against an order and judgment delivered by learned Additional Sessions Judge, Godhra, on 6th of May, 1995 in Session Case No.136/94, convicting the present appellant under Sections 302, 323 and 504 IPC, wherein present appellant was awarded sentence of life imprisonment for the offence proved against him under Section 302 IPC and fine of Rs. 1,000/- and in default to undergo rigorous imprisonment for two months, and no separate sentence was awarded for the offences proved against the appellant under Sections 323 and 504 of IPC. The appeal came to be admitted by this Court on 28th of December, 2001.

2. The facts leading to filing of the prosecution against the present appellant and other accused can briefly be stated that the incident in question occurred on 16.6.1994 at about 13.00 hours at village Antela. The complaint came to be filed by PW-3 Abhesing Gema before Devgadh Baria Police Station at 19.30 hours of the same day. Accordingly, complainant PW-3 Abhesing Gema and his brother Bachubhai Gema who is deceased in this incident, both were staying together. PW-3 Abhesing Gema was bachelor while deceased Bachubhai was staying as husband and wife with one Kakudiben, PW-4 though formal marriage ceremony had not taken place. The first incident took place on 15.6.1994 at night when according to the prosecution case PW-3 Abhesing and his brother were at their residence at about 8.00 p.m. present appellant original accused No.1 Bhemabhai Salubhai Patel and original accused No.2 (non-appellant) Gordhanbhai Salubhai Patel who were staying in the said falia, came and started giving abuses and threatened that PW-3 Abhesing Gema and deceased Bachubhai should not take part in any family gathering because they were declared out of the family. PW-3 Abhesing Gema and deceased Bachubhai told original accused No.1 not to abuse them, and this was followed by scuffle, and thereafter they were dispersed. On the next day i.e. on 16.6.1994, when PW-3 Abhesing Gema complainant and deceased Bachubhai were at their residence, at about 13.00 hours, appellant original accused No.1 Bhemabhai Salubhai started giving abuse to deceased Bachubhai, and Bachubhai persuaded him not to abuse him and this was followed by altercations between the parties. During this altercations, present appellant - Bhemabhai, original accused No.2 Gordhanbhai and original accused No.3 Amrabhai Ramjibhai Patel came running on the spot. This incident occurred between the houses of deceased and accused which are situated within the distance of 200 feet from each other. Though as per

the prosecution story accused came to the house of deceased and dragged him out towards the house of the accused. Present appellant and accused No.2 Gordhanbhai Salubhai had small sticks with them and original accused No.3 Amrabhai had stone in his hand. The present appellant inflicted blow of stick on the head and on the neck of deceased. Due to which, blood started oozing. Bachubhai fallen down on the ground and when PW-3 Abhesing Gema tried to intervene, the present appellant original accused No.1 inflicted blow of stick on left knee of Abhesing Gema. Original accused No.2 Gordhanbhai Salubhai also inflicted a blow of stick on right leg of Abhesing Gema and accused No.3 Amrabhai Ramjibhai pelted stones. There was boomerang and therefore all the three accused ran away from the spot. PW-3 Abhesing Gema thereafter went to the house of Police Patel PW-5 Gemalsing Pratapsing Patel and conveyed what had happened. Sister of deceased Bachubhai, Kaliben Gemabhai PW-7 Exh.27 was summoned because she was staying at different village and thereafter Kaliben, Kakudiben and Sursing cousin brother of the deceased all the three took the body of Bachubhai near Bhular Dam on the road and brought him to Baria where he was sent to Baria Hospital, but since the injury was serious, deceased was transferred to Godhra Hospital, where during treatment, on 22.6.1994 Bachubhai died in Godhra Civil Hospital and postmortem was performed. On 16th of June, 1994 before PW-8 Exh.28 Maniben Manabhai, who was In-charge PSO, Devgadh Baria Police Station, PW-3 Abhesing, gave his complaint about the incident which is at Exh. 29, from which the offence came to be registered and investigation was handed over to one PSI Baria Police Station PW-10 Dilipsinh Laxmansinh Rathod, who filed charge sheet against three accused. Present appellant accused No.1 Bhemabhai Salubhai Patel, accused No.2 Gordhanbhai Salubhai and accused No.3 Amrabhai Ramjibhai for the offence punishable under Sections 302, 323, 504, 506 (2) and 114 of the IPC and under Section 135 of the Bombay Police Act. During trial, original accused N.3 Amrabhai Ramjibhai Patel died and trial abated against him and trial proceeded against two accused - present appellant Bhemabhai Salubhai Patel and accused No.2 Gordhanbhai Salubhai Patel.

3. It is pertinent to note here that according to prosecution case, Police Patel noted the complaint of PW-3 Abhesing Gema on the spot in the form of a chit at village Antela which was produced by PW-3 before Devgadh Baria Police Station, which is on record at Exh.11.

4. Prosecution examined 10 oral witnesses and

produced documentary evidence. Before that, charge was framed against the accused by learned Addl. Sessions Judge, on 18th of March, 1995 for the above said offences to which both the accused pleaded not guilty and prosecution tendered the evidence. After recording further statement of the accused and after hearing both the sides, the learned Trial Judge came to the conclusion that present appellant - accused No.1 was liable to be punished under Sections 302, 323, and 504 of the IPC and he was sentenced to life imprisonment and as aforesaid while original accused No.2 Gordhanbhai Salubhai Patel acquitted of the offences charged against him under Section 302 of the Indian Penal Code and he was sentenced to 7 days simple imprisonment and fine of Rs.100/- in default to undergo simple imprisonment of three days. No separate sentence was awarded to accused No.2 for charge under Section 504 of the Indian Penal Code. Both the accused were given benefit of set off for the period they have remained under trial. This appeal therefore is preferred against the above said judgment and order by original accused No.1 Bhemabhai Salubhai Patel.

5. Learned Advocate Mr.Joshi for M/s Thakkar Associates for the appellant vehemently attacked the judgment and order on the ground that the case was resting only on one injured eye witness i.e.PW-3 Abhesing Gemabhai. It was argued that PW-3 Abhesing being brother of the deceased is related and highly interested witness and, therefore, without corroboration, his evidence cannot be accepted, especially when there are contradictions major in nature in the evidence of PW-3 Abhesing. The attention of the Court was drawn to Exh. 11 report written by the Police Patel Gemalsing Pratapsing Patel, PW-5, Exh. 25 and the complaint filed by PW3 - Exh. 29. It was stated that in Exh.11, it was nowhere stated that all the accused came running towards the house of the complainant and it is also nowhere stated that the deceased was beaten by stick by accused No.1 present appellant. It was therefore stated that it is not safe to rely upon a solitary eye witness who is related and interested and his evidence is found full of contradictions. It was also argued that in fact Exh.11 report prepared by the Police Patel, PW-5 ought to have been treated as an FIR by the trial court, instead Exh.29 which is nothing more than the statement under Section 162 of the Criminal Procedure Code is treated as an FIR by the Trial Court. It was argued that except PW-1 Abhesing Gema, there is no other witness of the incident and other witnesses examined are either not eye witnesses or though the prosecution tendered PW-4 Kakudiben as eye witness, she failed to support the version of the

prosecution. It was therefore argued that the present appellant is required to be acquitted of the charges levelled against him. Alternatively, it was also argued that if at all the court comes to the conclusion that the prosecution was able to prove its case beyond reasonable doubt, then this is a case of one blow that too by one stick and having regard to the attending circumstances of the incident, this is not a case of murder punishable under Section 302 of the Indian Penal Code, but the facts are squarely covered under Section 304 Part II of the Indian Penal Code i.e. culpable homicide not amounting to murder. It was also argued that the present appellant is arrested on 19.6.1994 and since then till today he is in jail, which comes to about more than 9 years.

6. Learned APP Mr. H.M. Pracchak on behalf of the State vehemently supported the judgment and order of conviction under challenge on the ground that this is not the law of land that the solitary eye witness cannot be believed or all time the single eye witness requires corroboration. Drawing our attention to the evidence and the judgment under challenge, it was argued that the learned Trial Judge took all the circumstances into consideration and came to the right conclusion to convict the present appellant under Section 302 of the Indian Penal Code and no interference at all is required.

7. Heard the learned Advocates appearing for both sides. We have travelled through each corner of the evidence recorded in the trial court, documentary evidence as well as oral. To come to a conclusion and to evaluate the contentions raised, it is necessary first to go through the evidence as recorded by the Trial Judge. As above said to prove the prosecution case, the prosecution examined in all 10 witnesses.

8. Prosecution examined Dr. Chandrahas Keshavrao Shikenvish, PW-1, Exh.15. He is the Doctor who examined the injured Bachubhai first point in time at about 5.20 p.m. He found injured Bachubhai unconscious and Bachubhai had one injury as under :

"C.L.W. 2" x 1/2" x 1/2" on left side scalp 4" above left eye.
Patient in comma.

He also examined PW-3 Abhesing Gema on next day i.e.on 17.6.1994 and Abhesing had one injury of C.L.W. 2" x 1/4" x 1/4" on left leg below the knee joint. He produced the certificates of deceased Bachubhai at Exh. 17 and in respect of PW-3 Abhesing at Exh.18. According

to this Doctor, the injury received on left parietal region by Bachubhai was serious in nature and therefore he was transferred to Civil Hospital at Godhra. He also stated that the injury could be caused by stick of mudammal articles No. 1 and 2. In Cross-examination, he admitted that on clinical examination it could not be found that Bachubhai had fracture, but his injury was bone deep. He also admitted that deceased had only one injury on the head and except that he had no other injury.

9. PW-2 Dr. Subhashchandra Nathalal Sutharia, Exh. 19 is examined by prosecution to prove postmortem of deceased Bachubhai Gemabhai. According to this witness, he was serving as Medical Officer, Godhra Civil Hospital on 22.6.1994. On that day, the dead body of Bachubhai Gemabhai was forwarded to him with inquest panchnama for performing postmortem examination. He started postmortem at 13.05 hours and completed it at 15.5 hours. According to this Doctor, he found two injuries on his head and those injuries were as under :

1. One stitched wound over left parietal region of skull about 3 cms in size - length.

2. One CLW over occipital region of skull about 3 cms x 1 cms x bone deep in size.

He deposed that those injuries were antemortem and corresponding following internal injuries were found on the body of the deceased .

"Subdural hematoma over frontal and left parietal region of skull.

1. Depressed multiple fracture of left parietal bone of skull.

2. Fracture of frontal bone.

3. Fracture of right parietal bone.

Subarachnoid and subdural haemorrhage present left parietal (to be) hemisphere, ruptured and crushed below external injury No.1."

According to the Doctor, cause of death was shock and haemorrhage due to the head injury. He prepared the post mortem note which he produced at Exh.20. According to him, external injury No.1 was corresponding to internal injury Nos. 1 2 and 3 and haemorrhage was due to this injury. This injury, according to Doctor was

sufficient in ordinary course of nature to cause death. In cross-examination he clarified that internal injury No.1 was on left parietal region while external injury No.2 was on occipital region, could have been caused by separate inflictions.

10. Complainant - Abhesing Gema solitary eye witness of the prosecution case is examined as PW-3 Exh. 23. According to him deceased Bachubhai was his brother. He had not married. He also was not married. Both the brothers were staying together. The incident took place at about 2.00 p.m. before one year of the deposition. Present appellant and the accused No.2 Gordhanbhai Salubhai came to their house giving abuses to his brother Bachubhai and saying that Bachubhai and Abhesing must not sit together in their family gathering. Appellant i.e. accused No.1 had small stick in his hand and he inflicted a blow on the head of Bachubhai. Accused No.2 Gordhanbhai Salubhai inflicted a stick blow on left hand of Abhesing and thereafter accused No.3 Amrabhai picked up stones and pelted against deceased Bachubhai which was hit in his back, that he explained to be the neck. Deceased Bachubhai had fallen down on the ground in the court yard of the house of the present appellant. He explained that all the accused seized Bachubhai and dragged him to their house and therefore Bachubhai fell on the ground in the court yard of the house of the appellant. Thereafter all the three accused ran away and he went to the house of Police Patel PW-5 Gemalsing Pratapsing Patel. Police Patel Gemabhai wrote a report and thereafter near Bhular Dam on the road, hired a jeep and Bachubhai was sent to Baria Police Station and from there to Baria Hospital. Bachubhai was transferred to Godhra Hospital from Baria Hospital and Bachubhai died in Godhra Hospital. The witness further stated that he gave complaint before Baria Police Station, which was shown to him and according to him that was the complaint which he offered. Mudammal articles No.1 and 2 sticks were shown to him and he identified the same. He stated that the husband of PW-4 Kakudiben had died and, therefore, Kakudiben was staying with his deceased brother Bachubhai as his wife but they had not married. In his cross-examination, he was confronted with Exh.11 a report written by Police Patel. Questions were asked about the situation and location around the scene of offence to show that the incident might have been seen by many others. He was confronted with his First Information Report that in his complaint he did not mention that deceased Bachubhai was dragged by the accused towards their house. He admitted that the incident took place near the house of Bhemabhai. In his cross-examination he

further admitted that his brother had 4 to 5 injuries on his head and those injuries were injuries of stones which were pelted by the accused.

11. Kakudiben, PW-4 has been examined at Exh. 24 and according to the prosecution case, originally she was also an eye witness but she did not support the prosecution case. She stated that his earlier husband Galabhai died and thereafter she was staying with the deceased Bachubhai. When the incident occurred she was grazing her goats in the field. She ran towards the incident and noticed that accused Amrabhai pelted stones. She did not witness anything else. In cross-examination on being declared the witness to be hostile, learned APP confronted her with her statement recorded by Police under Section 162 of the Criminal Procedure Code. In cross-examination of defence, she stated that deceased Bachubhai and PW-3 Abhesing went to the house of the accused for abusing them. At that time deceased Bachubhai had a stick in his hand which she identified mudammal Articles No. 1 and 2.

12. PW-5 Gemalsing Pratapsing Patel, has been examined by the prosecution at Exh.25. He was Police Patel at the relevant time and when he was at the residence of Bhemabhai for a function, PW-3 Abhesing came there. There was injury on his leg. On inquiry, Abhesing stated that at about 12.00 p.m., they had a quarrel with the accused and stick was hit on his leg and a blow of stick also was inflicted on the head of Bachubhai. According to this witness, thereafter he went to the scene of offence with PW-3 Abhesing and noticed that deceased Bachubhai was lying on the ground towards the house of the appellant. He was not able to speak and blood was oozing from his head. He advised to summon Kaliben, sister of the deceased and he got a report written from some other boy and he signed it, which is at Exh.11. He then advised to take Bachubhai to Baria Police Station and thereafter to the hospital. In cross-examination, contradictions in respect of Exh. 11 report were attempted to be proved by the defence. His cross-examination is lengthy and some questions are asked about the panchnama of scene of offence. He denied the suggestion that PW-3 did not convey to him that who had beaten PW-3 and his brother Bachubhai. The witness is not an eye witness.

13. Prosecution examined PW-6 Gopsing Raylabhai at Exh. 6 being uncle of the deceased. He is only a supporting witness and he was informed by Kaliben about the incident.

14. PW-7 Kaliben Gamabhai is examined at Exh. 27 being the sister of the deceased. According to her, she was at her residence at village Bhular when she was summoned by Kakudiben at about 11.00 a.m. Kakudiben narrated the incident occurred that both her brothers were beaten by the appellant and other two accused. So the witness came to the scene of offence where she noticed Bachubhai lying on the ground. Abhesing was present. She accompanied Abhesing and others took Bachubhai to Baria. This witness is also not an eye witness but supporting witness.

15. PW-8 Maniben Manabhai is examined at Exh. 28 and she was In-charge PSO of Bariya Police Station on 16.6.1994 where at 19.30 hours PW-3 Abhesing Gemabhai came and declared his complaint which was written by her and a left hand thumb impression was obtained and thereafter she registered the offence and investigation was entrusted to PSI Dilipsinh Laxmansinh Rathod. The complaint was produced at Exh.29, even after objected by the defence. In cross-examination she was confronted with the report of Police Patel at Exh. 11 and she admitted that she felt that the report at Exh.11 discloses cognizable offence.

16. Dr.Prabhakar Ramubhai Bhatia is examined as prosecution witness at Exh.30, who treated Bachubhai at Godhra Hospital. According to him, on 17.6.1994 while he was serving as Medical Officer, Godhra Civil Hospital at about 3.00 p.m. with transfer chit Bachubhai Gemabhai was brought to his hospital. The transfer chit was produced at Exh.31. According to him, on examination, he found one injury on left parietal region and according to him it was punctured wound. Patient was unconscious. The patient died at 3.45 hours on 22.6.1994. He was transferred to surgical ward where he was treated by this witness and other Doctors. He produced indoor case papers at Exh. 32 and x-ray plate at Exh.33. In cross-examination, he admitted that except the head injury which he noted in the case papers, he did not notice any other injuries on the body of the deceased.

17. PW-10 Dilipsinh Laxmansinh Rathod, is examined as prosecution witness No.10 at Exh. 34 who investigated the offence being PSI of the Devgadh Baria Police Station. On entrustment of investigation, he draw the panchnama of scene of offence and other panchnamas. He recovered mudammal and recorded the statements of the witnesses. Prosecution attempted to prove whatever stated by PW-4 Kakudiben before the Investigating

Officer. In his cross-examination, contradiction in respect of Exh.11 were asked by the defence.

18. In addition to the above oral evidence, prosecution also tendered the documentary evidence as under :

Inquest Panchnama - Exh.8, Panchnama Exh.10, which is the panchnama of the seizure of clothes of the deceased, Exh.13 panchnama of scene of offence, Exh.14 result of analysis of Forensic Science Laboratory, Exh. 22 map of the scene of offence, Exh.35 arrest panchnama of the accused and panchnama of recovery of sticks from the accused.

19. On appreciating the evidence as a whole tendered by the prosecution, it clearly emerges that the case of the prosecution though hinges on only eye witness PW-3 Abhesing Gemabhai, in his support there is medical evidence of three doctors, namely, PW-1 Dr. Chandrahas Keshavrao Shikenvish, PW-2 Dr. Subashchandra Nathalal Sutharia and PW-9 Dr. Prabakar Ramubhai Bhatia, as above said. Other witnesses including PW-5 Gemalsing Pratapsing Patel - Exh.25 Police Patel, are not eye witnesses but they are also supporting witnesses. The prosecution is able to prove that the incident in question had occurred in which deceased Bachubhai received injuries on left parietal region which proved fatal and PW-3 Abhesing also received one injury by stick on his left leg. Police Patel PW-5 Gemalsing Pratapsing Patel reached at the place of scene of offence immediately after the incident and he saw Bachubhai lying on the ground. PW-4 Kakudiben also though after sometime reached at the scene of offence and found Bachubhai at the scene of offence. Therefore, in support of sole eye witness, there is ample medical evidence to corroborate the say of sole eye witness and other evidence which is supporting in nature is also available on record. It is amply proved that Bachubhai died due to injury which he received on left parietal region resulting in fracture and haemorrhage causing death. True it is, that when witness is related and interested his evidence must be scrutinised very carefully. We have dispassionately and carefully examined each corner of the evidence of sole eye witness but we do not find any reason to disbelieve the version given by PW-3 Abhesing before the Court. The Trial Court was correct in treating Exh.29 being FIR because Exh.11 report prepared by the Police Patel PW-5 Gemalsing Pratapsing Patel is nothing but the cryptic message written on a paper through an agency of literate boy of the village. When we examined Exh.11, we find no

such contradiction as contended on behalf of the appellant to disbelieve PW-3 Abhesing. On the contrary, PW-3 Abhesing finds support and corroboration from Exh.11 to the extent that the incident occurred as narrated by him. It is not the rule of law that when the solitary eye witness is found related or interested, his testimony cannot be accepted without corroboration. Though some contradictions are attempted to be magnified on the part of the appellant, but these are not contractions affecting the core of the prosecution case. We do not find any major contradiction between the evidence before the court and the complaint filed by the PW-3 before the Police i.e. Exh. 29, except he exaggerated the version to the extent that his brother Bachubhai was dragged by the accused towards their house and deceased fell on the ground near the house of the accused. But so far as the part of the story that the accused No.1 i.e. present appellant inflicted a blow by a stick on left parietal region of the deceased stands proved and there is no earthly reason to disbelieve this part of the prosecution story which is satisfactorily supported by medical evidence. The evidence of Kakudiben PW-4 who has turned hostile is neither here nor there and not supporting to either the prosecution or aiding to the defence to disbelieve the version narrated by PW-3 Abhesing. It is also found that PW-2 Dr. Subhashchandra Nathalal Sutharia found two injuries on the body of the deceased while PW-1 Dr.Chandrahas Keshavrao who examined deceased first point in time at Baria hospital found only one injury on the left parietal region of the deceased, but this fact itself is not capable of disbelieving the prosecution case to the extent that appellant inflicted stick blows on left parietal region of the deceased. There is nothing on the record to disbelieve also that PW-3 Abhesing and deceased Bachubhai both were staying together at village Antela on same falia where accused were also residing. We found nothing also in the record that the injury caused to PW-3 Abhesing on his leg and as corroborated by PW-1 Dr. Chandrahas Keshavrao was not self-inflicted so as to disbelieve the presence of this witness at the scene of offence. Though PW-3 Abhesing has been examined by PW1 Dr. Chandrahas Keshavrao on the next day with police yadi, but it could be understood that on the day of incident when Bachubhai was in the hospital and since PW-3 Abhesing attending him in all the procedure to transfer the deceased Bachubhai to Godhra Hospital, PW-3 Abhesing could not be expected to be examined by the Medical Officer on the same day. If over all view of the matter is taken by careful scrutiny, the prosecution case stands proved to the extent that appellant inflicted a stick blow on deceased i.e.on left

parietal region and due to this injury deceased Bachubhai died. It is also proved that the injury which was caused to Bachubhai was sufficient in the ordinary course of nature to cause death and was antemortem injury. Therefore to this extent, the case of the prosecution is proved by the evidence of PW-3 Abhesing by the evidence of medical experts PW-1 Dr. Chandrahas Keshavrao, PW-2 Dr. Subhashchandra Sutharia and PW-9 Dr.Prabhakar Ramubhai Bhatia along with two supporting witnesses i.e. PW-4 Kakudiben and PW-5 Gemalsing Pratapsing. The documentary evidence produced by the prosecution especially Exh.11 report of Police Patel, Exh.13 panchnama of scene of offence, Exh. 17 and 18 injury certificates of deceased and complainant PW-3 Abhesing, Exh.20 postmortem notes are the documents supporting the say of PW-3. Therefore, to this extent, we come to the conclusion that the learned Trial Judge was correct in taking the view that the incident occurred as narrated by PW-3 and deceased Bachubhai died due to injury which he received at the hands of the present appellant which was blow by a stick. So, we are unable to accept the first contention of the learned Advocate for the appellant to acquit the accused from the charges levelled against him.

20. When we come to the second limb of the argument of the learned Advocate for the appellant, we find that though incident is proved and it is proved also that the deceased Bachubhai died due to blow given by present appellant on left parietal region but the crucial question which requires to be considered is whether in the facts and circumstances of the case, present appellant has committed offence punishable under Section 302 of the IPC.

21. Sections 299 and 300 of the Penal Code makes clear distinction between murder and culpable homicide. All murders are culpable homicide but having regard to Sections 299 and 300, all culpable homicides are not murders. Culpable homicide is broad term which includes murder when the act has special characteristics. Indian Penal Code practically recognizes three degrees of culpable homicide. The first degree of culpable homicide is covered by Section-300 of the IPC and punishable under Section 302. This is the ultimate grievous form of culpable homicide, which we recognizes as murder. The second degree of culpable homicide is lesser grave than the first and a type of this culpable homicide is punishable under Section 304 Part-I of the Indian Penal Code while the lowest type of culpable homicide is punishable under Section 304 Part-II of the IPC. On reading minutely those provisions of law, it is clear

that the distinction amongst three kinds of above act is subtle but discernible. Proportion and gravity of mens rea which is essential part of the criminal act is attached in different degrees with each of the three types of culpable homicide as aforesaid. This mens rea is required to be measured from the facts of the case and other attending circumstances. On going through Section 300 from the facts of this case, we will have to ascertain whether the act was done with the intention of causing death, or with the intention of causing such bodily injury as the appellant knew to be likely to cause death, or the appellant caused with such intention that such bodily injury which was sufficient in the ordinary course of nature to cause death, or the appellant knew that his act was so imminently dangerous that it must in all probability shall cause death without any excuse for incurring the risk of causing death or such injury. If facts and circumstances does not attach the mens rea of the aforesaid degree, then offence must fall within the ambit of Section 229 i.e. culpable homicide and punishable under Section 304 of the IPC. Therefore, from the facts of the case, it is essential to find and discover mens rea of the appellant.

22. In this respect when we advert to the facts of the case, we find that on the earlier day of the incident, there was quarrel and scuffle between the parties, which came to an end and both the parties dispersed. The accused and complainant's side both were residing in the same falia. The cause of dispute was nothing but so trivial to the extent only to the insistence of the accused that the complainant's side should not sit together with the accused in family gathering. The only intention and motive we attribute in these circumstances of the case to the accused, only to prevent the complainant's side from sitting together with them in family gathering. Like earlier day therefore the quarrel ensued on the next day and in which, as appeared from the facts of the case, only single blow was inflicted by the appellant on the right parietal region of the deceased. There are three accused and only one i.e. appellant inflicted only single blow. Had their mens rea to the degree of killing the deceased Bachubhai in the ordinary course of events, we would have found more vital and cruel blows on the body of the deceased. But this seriousness neither culminated in the quarrel took place on earlier day or on the day of the incident and, therefore, it was a sudden quarrel for the above said limited motive and intention, in which a single blow was inflicted by the appellant on right parietal region of the deceased. In these facts and circumstances of the

case, we are unable to attach the intention and required mens rea to bring the act of appellant within the ambit of Section 300 to be murder punishable under Section 302. True it is that the injury inflicted was on vital part of the body. It is also true that the injury inflicted was sufficient in ordinary course of nature to cause death of the deceased but the crucial question which arises in these facts and circumstances that whether there was an intention on the part of the appellant accused to inflict injury and that too with intention either to kill the deceased or to inflict such injury, as sufficient in ordinary course of nature to cause death. It is also true that single blow on vital part of the body causing death may lead to the presumption that the author of the injury had such intention, but such presumption is not absolute and must further be probed with the aid of attending circumstances. Therefore, when the intention was only to prevent the complainant's side to take part in family gathering of the accused, we are unable to stretch the prosecution case upto that mens rea on the part of the appellant that he possessed the required mens rea and intention to kill the deceased when he inflicted a blow by a small stick of babul tree, though on vital part of the body. On strict scrutiny, it is easily discernible that premeditation and required intention under Section 300 of the IPC is totally absent in the act committed by the appellant and proved against him. Along with this, it must be borne in mind that the blow was inflicted by a stick which is only 2 feet, according to the panchnama, and that too, a stick of babul tree, which in that part of country perhaps used by every citizen, which perhaps many not be strictly fall in the category of weapon. The second very important aspect which is required to be borne in mind while coming to the conclusion as to the house of the appellant is the exact place of scene of offence. While going through the panchnama of scene of offence, which is placed at Exh.13 and map of scene of offence, which is at Exh. 22, it is found that the incident had occurred near the house of the accused. The scene of offence is only 20 feet away from the house of the accused while it is away by 150 feet from the house of the complainant, clearly suggesting that the accused did not rush to the house of the complainant with the intention to quarrel with them, but it appears from the evidence of PW-3 that the quarrel took place on account of perhaps both the party met each other at some juncture where the scene of offence is shown in the map of panchnama and during altercation a blow came to be inflicted by the appellant. When we take totality as aforesaid of the prosecution case in the consideration, it clearly emerges that though the act of

inflicting blow on the deceased on the part of appellant is proved, but the required intention to saddle liability of murder could not be proved by the prosecution. At the most we can attach knowledge on the part of appellant to the extent of injury which he inflicted was sufficient in ordinary course of nature to cause death but in no case we can stretch the prosecution case further. In the above circumstances, we positively conclude that the prosecution was able to prove only the lowest type of culpable homicide punishable under II Part of Section 304 of the IPC.

23. Our view is fortified by the Apex Court in the following decisions.

In the case of BHERA vs STATE OF RAJASTHAN, reported in (2000) 10 SCC 225, when accused and deceased while quarreling, accused brought out knife and gave blow on chest of the deceased resulting in the death, the Apex Court held that there was no intention on the part of the accused to give knife blow with the requisite intention of causing murder of the deceased and the offence would fall under Section 304 Part-II.

In the matter of KUNHAYIPPU vs. STATE OF KERALA, reported in (2000) 10 SCC 307, on the facts that deceased and accused were in friendly mood and suddenly accused after going behind deceased, inflicted one knife blow on his abdomen from the back which resulting in his death, the Supreme Court held that the accused had not the necessary intention of causing murder of the deceased while giving of blow though ultimately the blow became fatal. The conviction was altered to that of Section 304 Part-II from Section 302 of IPC.

In the matter of CAMILO VAS vs. STATE OF GOA, reported in (2000) 9 SCC 1. As per the facts of that case that there was group rivalry between boys of two villages. Accused and others armed with dandas, bottles and cycle chains, coming to the house of deceased and his brothers belonging to other village, with the intention to thrash them. The accused Camilo Vas hitting with a danda on the deceased's head, a vital part of the body, with such force that deceased falling down unconscious and later succumbing to his injury and from that facts, the Apex Court came to the conclusion that there was no evidence to show that the accused Camilo Vas was bent upon killing the deceased though the act of the accused in hitting the deceased on vital part of the body was done with the knowledge that it was likely to cause death but without any intention to cause death or to cause such

bodily injury as was likely to cause death. The Supreme Court converted the conviction under Section 304 Part -II and set aside the conviction under Section 302 recorded by the courts below.

24. Following the ratio laid down by the Apex Court in the above said cases and as discussed, from the facts of the preset case stated as above, it clearly transpires that though the incident is proved, the act of the appellant clearly falls within the scope of Section 304 Part-II of the Indian Penal Code. The Appeal of the appellant therefore is required to be allowed to the extent and the conviction is required to be converted to under Section 304 Part-II from Section 302 of the IPC and to that extent the impugned judgment and order is infterfered with. It is found from the jail sheet submitted by the learned APP for the respondent State that the accused is in judicial custody right from 19.6.1994 which comes to about more than 9 years and, therefore, the life sentence awarded by the learned Trial Judge for the charges proved against the appellant under Section 302 of the IPC is also required to be set aside and the sentence is also required to be converted to imprisonment already undergone. In this view of the matter, the following final order is passed.

25. In the result, this Appeal is allowed partly to the extent that the conviction awarded to the appellant by learned Addl. Sessions Judge, Godhra, on 6th of May, 1995 for the charges proved against the appellant under Section 302 is converted into one under Section 304 Part-II of the IPC i.e. culpable homicide, not amounting to murder, and sentence awarded by the learned Addl. Sessions Judge to the appellant of life imprisonment and imposing of fine of Rs.1,000/- in default to undergo rigorous imprisonment of two months for the charges proved against him under Section 302 IPC is set aside, and instead, for the charges proved against appellant under Section 304 Part-II of the IPC, the appellant is sentenced to the imprisonment already undergone by the appellant, which comes to more than 9 years as aforesaid in view of the appellant being in jail from 19th of April, 1994. The rest of the order of the learned Addl. Sessions Judge in respect of muddamal article is left uninterfered. The appellant is directed to be set at liberty forthwith if he is not required to be detained in jail for any other purpose.

(B.J. Shethna, J.)

(J.R. Vora, J.)

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